

FEDERAL MAGISTRATES COURT OF AUSTRALIA

ACHARYA v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 169

MIGRATION – Application to review decision of Migration Review Tribunal – application for spouse visa – Tribunal not satisfied criteria met at time of decision – no jurisdictional error.

Migration Act 1958 (Cth) ss.359A, 476

Migration Regulations 1994 (Cth) rr.1.15A, 1.20J

Applicant A169 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) FCAFC 8 at 31

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

1. *Re Refugee Review Tribunal; Ex Parte H* (2001) 75 ALJR 982

2. *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749

Zubair v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 139 FCR 344

Applicant:	SHALIEGH KUMAR ACHARYA
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 3179 of 2006
Judgment of:	Barnes FM
Hearing date:	14 February 2008
Delivered at:	Sydney
Delivered on:	14 February 2008

REPRESENTATION

Applicant: In Person

Solicitors for the Respondent: Australian Government Solicitor

ORDERS

- (1) That the application be dismissed.
- (2) That the applicant pay the costs of the first respondent fixed in the sum of \$4,300.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 3179 of 2006

SHALIEGH KUMAR ACHARYA
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

3. This is an application for review of a decision of the Migration Review Tribunal handed down on 6 October 2006 affirming a decision of a delegate of the first respondent not to grant the applicant a Partner (Temporary) (Class UK) visa or a Partner (Residence Class) (BS) visa.
4. The background to these proceedings is that the applicant arrived in Australia in 2001 as the holder of a student visa. His last student visa ceased in May 2004. Thereafter he held a bridging visa. On 24 December 2004 he applied for a partner visa on the basis that he was in a spousal relationship (a de facto relationship) with a Ms Bibi, an Australian citizen (the sponsor).
5. The applicant and the sponsor were invited to attend an interview with the Departmental delegate in December 2005. At the applicant's

request the interview was rescheduled. On 19 December 2005 the Department received a letter from the applicant stating that he was unable to attend the interview because of “relationship problems” which included the information that he had been unable to contact his sponsor who had gone to Melbourne in December 2005 but had been informed by her friends that her parents wanted her to marry another man in an arranged marriage. He elaborated on the background to his relationship with the sponsor, difficulties they had experienced and their different religious backgrounds.

6. On 22 December 2005 the delegate refused to grant the applicant the visa sought, not being satisfied that the applicant and the sponsor were living together (or not living separately and apart on a permanent basis) for 12 months prior to the application. The delegate found that there were no compelling or compassionate reasons for not applying that requirement and that the applicant had failed to meet the definition of spouse in regulation 1.15A of the *Migration Regulations 1994* as required under subclause 820.221(2) of the criteria for a spouse visa.
7. The applicant sought review by application lodged with the Migration Review Tribunal on 19 January 2006. The Tribunal wrote to the applicant on 15 January 2006 under section 359A of the *Migration Act 1958* (Cth) inviting him to comment on information that it considered would be the reason or a part of the reason for affirming the decision under review.
8. In particular, it referred to the information the applicant had provided the Department of Immigration in his letter received by the Department on 19 December 2005. The letter also referred to information in the applicant's statutory declaration of 23 December 2004, including the circumstances in which he met the sponsor and his evidence that she lived with her parents and then moved to live with her friend's sister.
9. The applicant was advised that this information was relevant as it could lead the Tribunal to decide that the applicant did not satisfy the requirements of the definition of “*spouse*” in regulation 1.15A of the *Migration Regulations*. The Tribunal also put to the applicant that as his last substantive visa had ceased he may have to satisfy criteria in Schedule 3 to the *Migration Regulations 1994* unless there were compelling reasons for not applying those criteria.

10. The applicant responded to the section 359A letter in a detailed written response received by the Tribunal on 25 July 2006. He addressed each of the points raised in the section 359A letter and advised the Tribunal, quite frankly, that while he and his wife had been together until December 2005 she had left and he had not been able to contact her and had not heard from her since that time. The applicant attended a Tribunal hearing on 31 August 2006.
11. In its reasons for decision the Tribunal set out the relevant criteria for the temporary partner visa for which the applicant had applied. It referred to the definition of “*spouse*” and the policy guidelines in relation to compelling circumstances where Schedule 3 to the Regulations was applicable. The Tribunal summarised the applicant's claims and evidence, the decision of the delegate, the section 359A letter and the response and the applicant's evidence at the hearing. In that respect it is relevant to note that the Tribunal had invited the sponsor to attend the hearing, but was informed that the applicant had been unable to contact her in order to extend the Tribunal's invitation.
12. The Tribunal recorded that the applicant told it that he had not seen the sponsor since the end of 2005 and had tried to call her numerous times. He had gone to Melbourne to contact her to tell her of the interview with the Department. He told the Tribunal that while she said she would return to Sydney, her mobile phone had been turned off and he had not seen her. He again recounted that he had heard that her parents wanted her to marry someone in Fiji and suggested that perhaps this had happened and that she could be married or engaged.
13. The applicant also told the Tribunal that before the sponsor went to Melbourne the relationship had been going well despite some financial difficulties and uncertainties about their future and that, although the sponsor's parents would not let her live with him initially, she had later lived with him for eight or nine months.
14. In its findings and reasons the Tribunal referred to the criteria for a subclass 820 visa and the questions involved in those criteria. However, for reasons that it gave, it was satisfied on the material before it that at the time of decision the applicant was not the spouse of the sponsor within the meaning of regulation 1.15A of the Regulations as required by clause 820.221 of the *Migration Regulations 1994*.

15. In that context the Tribunal had regard to the applicant's evidence that he had not had contact with the sponsor for approximately nine months and to what he had told it in that regard, including the fact that he had not met the sponsor's parents and did not know their address and that a marriage may have been arranged to another man for the sponsor.
16. The Tribunal addressed the factors in Regulation 1.15A(3). It was not satisfied that at the time of decision the applicant and the sponsor pooled any financial resources. It referred to the fact the applicant was currently supported by friends with whom he lived. It was not satisfied that the relationship was acknowledged or supported by family on either side, noting that the applicant stated he had not met the sponsor's parents (who had not been happy about the relationship) and that his own parents were not happy about him giving up his studies, which he had done due to the relationship. Nor was it satisfied that the applicant and sponsor shared any social activities at the time of decision, as they had not seen each other for about nine months. It was not satisfied that the sponsor had a commitment to a relationship with the applicant, as the applicant had given evidence that the sponsor had not contacted him for about nine months.
17. The Tribunal concluded that it was not satisfied that the applicant and sponsor had a mutual commitment to a shared life together as husband and wife to the exclusion of all others and that the relationship was genuine and continuing. It found that they were not living together and were living separate and apart on a permanent basis.
18. Hence the Tribunal found that the visa applicant was not the spouse of the sponsor within regulation 1.15A at the time of decision. Thus clause 820.221 of Schedule 2 was not satisfied. The Tribunal stated that given this finding it did not make findings about the relationship between the visa applicant and the sponsor at the time of application. Further, although the applicant had not held a substantive visa at the time of application, given its finding that the applicant was not the spouse of the sponsor at the time of decision it was not necessary for the Tribunal to consider whether there were compelling reasons for not applying the Schedule 3 criteria.
19. The Tribunal also addressed other time of decision criteria in subclauses 820.221(2) and (3), finding no evidence that the sponsoring

spouse had died, that the applicant had suffered domestic violence committed by the sponsoring spouse or that the applicant and sponsor had any dependent children together. Hence such requirements were not satisfied.

20. On that basis the Tribunal found that the applicant did not meet the criteria for Class BS visa (which required the visa applicant to be the holder of a subclass 820 visa). It concluded that it had no alternative but to affirm the decision under review.
21. The applicant sought review of the Tribunal decision by application filed in this Court on 31 October 2006. The applicant also filed an affidavit which reiterated the grounds relied on in the application and annexed a copy of the Tribunal decision. The applicant did not file written submissions. When given the opportunity to make oral submissions he took issue with the Tribunal's decision that he did not meet the criteria for the visa he applied for on the basis that his sponsor had left him, that he did not leave her and also that he had explained his difficulties in providing documents and the circumstances in which they had not lived together given her Muslim religion. He also took issue with the time that he had, in effect, "*lost*" because of the circumstances in which he had found himself.
22. The applicant contended that the Tribunal erred in failing to consider that the sponsor was a Muslim and that because of their circumstances and the fact that they did not live together for the "full time" or have joint accounts, he was unable to provide the sort of documents that might have been provided.
23. Insofar as the applicant takes issue with the merits of the Tribunal decision, merits review is not available in this Court. Factual findings are matters for the Tribunal. Moreover, as set out above, the Tribunal's findings did not address (and did not have to address) whether the applicant and the sponsor had ever been in a spouse relationship. Rather the Tribunal considered, as it was open to it to do, whether or not the criteria for the visa were met at the time of the decision, in particular whether the relationship came within the definition of spouse in regulation 1.15A at the time of the Tribunal's decision. The Tribunal addressed the necessary factors in regulation 1.15A(3) in relation to all of the circumstances of the relationship at the time of decision.

24. The concern that the applicant raised about the nature of his relationship with the sponsor at a time prior to the time of decision does not establish jurisdictional error as the Tribunal was addressing the nature of the relationship at the time of the decision.
25. Insofar as the applicant's oral submissions are intended to contend that his circumstances were compelling because he had had a genuine relationship, as the Tribunal indicated, having found that the visa applicant was not the spouse of the sponsor at the time of decision, the Tribunal did not have to make findings about the relationship at the time of application. Nor did it have to consider whether (despite the fact that the applicant did not hold a substantive visa at the time of the application) there were compelling reasons for not applying the Schedule 3 criteria.
26. The grounds in the application start by referring to the definition of spouse. Paragraph 6 takes issue with the Tribunal decision by contending that the applicant's circumstances were compelling and that he had a genuine relationship but that as his de facto partner was Muslim her:
- “family members have been hiding her away from me as my Nepali background is not acceptable to them. Whereas we love each other tremendously and the family is putting pressure on [the sponsor] to get married to someone else. Through some sources she is trying to escape and marry me.”*
27. The application continues (in a paragraph numbered 2): *“The first respondent without any testing of that evidence and/or making investigation of the “compelling circumstances” indicated above “have been unreasonable”.* The next ground (paragraph 3) contends that no proper or proper assessment was made either by the first respondent or the second respondent *“of the circumstances which the applicant underwent and have genuinely been in a de facto relationship. The decision maker is in total disregard of the Migration Act”.*
28. Paragraph 4 contends that there is *“no evidence”* to *“prove the ingenuity (sic)”*. Paragraph 5 contends that there were compelling reasons for not applying the criteria in clause 820.211 of Schedule 2 to the Regulations. Paragraph 6 is a contention that at the time of application the applicant was the spouse of the sponsor. Paragraph 7

refers to regulation 820.211(2)(d). Paragraph 8 contends that the relationship is genuine and continuing and that there are compelling circumstances. Paragraph 9 contends that in its finding and reasons the Tribunal did not accord the applicant procedural fairness and that the findings and reasons were induced or affected by apprehended bias.

29. Insofar as the applicant takes issue with the decision of the delegate I note first that the decision under review is the decision of Migration Review Tribunal. The date of the decision in the application filed in this Court is incomplete – “14 Sep 200”. The date of the Tribunal decision was 14 September 2006 (handed down on 6 October 2006). I refer to the limits in section 476(2)(a) of the *Migration Act 1958* on this Court's jurisdiction in relation to primary decisions. Moreover the applicant sought and obtained review by the Tribunal. It is well established that a Tribunal review can cure a defect in a delegate's decision. (See *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 344 at [28]).
30. In relation generally to the contentions of the applicant about his circumstances, as indicated above, merits review is not available in this Court. It was not necessary for the Tribunal to consider whether or not there were circumstances that amounted to compelling reasons for not applying the Schedule 3 criteria as the Tribunal had reached its decision on the basis that the applicant was not in a spouse relationship with the sponsor at the time of the Tribunal decision.
31. Therefore, whether or not there had been such relationship in the past and whether there were compelling reasons in circumstances where the applicant did not hold a substantive visa, did not have to be determined. The applicant's contentions in relation to his circumstances do not establish that the Tribunal made a jurisdictional error in the manner in which it considered the requirements of the criteria in regulation 1.15A and clause 820.221 of Schedule 2. Its decision was not based on the time of application criteria in clause 820.211.
32. Nor was it necessary for the Tribunal to investigate whether or not the applicant's circumstances were compelling. Compelling circumstances are not a reason for dispensing with the application of the criteria for a spouse visa as seems to be contended. It is for an applicant to put material before the Tribunal and for the Tribunal then to determine

whether it is satisfied on the material before it that the applicant meets the criteria for the class of visa for which he applied.

33. The Tribunal put information to the applicant for comment under section 359A of the *Migration Act 1958*. The Tribunal took into account the response to that letter and also the applicant's oral evidence at the hearing as well as his written claims. I note that the only evidence before the Court as to what occurred in the hearing is the Tribunal reasons for decision.
34. Insofar as it is contended that no proper attempt was made to consider the circumstances of the applicant and his claim that he had genuinely been in a de facto relationship, the Tribunal properly considered the applicable criteria at the time of its decision on the basis of the circumstances at the time of the decision and the evidence put before it by the applicant in that regard. It has not been established that there was a jurisdictional error, either consisting of a failure to apply the provisions of the *Migration Act 1958* or otherwise. Insofar as these grounds take issue with the Tribunal's factual findings, merits review is not available in this Court. (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at [272]).
35. Paragraph 4 appears to raise a no evidence ground, although it is not clarified by particulars. However this is not a case in which it can be said that there was no evidence in the sense considered in *Applicant A169 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) FCAFC 8 at [31]. The Tribunal's findings were made on the basis of the evidence given to it by the applicant in his response to the 359A letter, the material provided to the Department and his oral evidence. No jurisdictional error is established on this basis.
36. Ground 5 takes issue with whether or not there were compelling reasons for not applying the criteria. As indicated, the Tribunal did not have to determine whether there were compelling circumstances for not applying the criteria in Schedule 3 to the Regulations. Insofar as the applicant takes issue generally with the Tribunal's decision and perhaps seeks that the criteria for the visa should not apply on some humanitarian grounds, the Court has no discretion on humanitarian

grounds. The Tribunal must, as it did, apply the criteria as they appear in the Regulations.

37. In paragraph 6 the applicant contended that he met the requirements for the visa at the time of application. Even if that were so, a matter which it is not necessary or appropriate for this Court to determine, that would not demonstrate error on the part of the Tribunal because the decision did not turn on that issue.
38. Ground 7 again takes issue with the Tribunal's approach to compelling reasons and the Schedule 3 criteria but no error established in the Tribunal's finding that it did not need to address that issue in the circumstances of this case.
39. Ground 8 alleges that the applicant's de facto relationship continues, is still genuinely continuing and meets the Regulations and refers to the "*compelling circumstances*" of the sponsor's Muslim Orthodox religion. Again, insofar as this ground takes issue with the factual findings of the Tribunal it does not establish jurisdictional error. No error has been demonstrated in the manner in which the Tribunal approached the requirements of the definition of spouse in regulation 1.15A of the Migration Regulations.
40. The reference to regulation 1.20J does not assist the applicant. Regulation 1.20J deals with limitations on approvals of sponsorship in circumstances where a sponsor has sponsored more than one prospective spouse. It does not assist to establish jurisdictional error in these circumstances. Insofar as the applicant intended to refer to regulation 1.15A, nothing in the material before the Court establishes that the Tribunal erred in the manner in which it approached the elements of that definition. It considered all of the circumstances, including those referred to in regulation 1.15A and the elements of the definition of spouse applicable to a de facto relationship at the time of decision.
41. As to the general contentions that the Tribunal did not accord the applicant procedural fairness in its findings and reasons and that the findings and reasons were induced or affected by apprehended bias, an allegation of apprehended bias is a serious allegation. There is no transcript of the Tribunal hearing before the Court. Apprehended bias

is not established. (See *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749 and the discussion of the concept of apprehended bias in *Re Refugee Review Tribunal; Ex Parte H* (2001) 75 ALJR 982). On the contrary, what appears from the material before the Court is that the applicant was given every opportunity (by way of the section 359A letter and in the hearing) to put his case. The fact that he did not obtain the visa, which seems to be essence of his concern, does not establish apprehended bias or a lack of procedural fairness on the material before the Court. In effect the applicant takes issue with the manner in which the *Migration Regulations 1994* have operated in his circumstances, but that does not establish a jurisdictional error on the part of the Tribunal.

42. There is no evidence before the Court such as to establish an error of law, either being an incorrect interpretation of the applicable law or incorrect application of the law to the facts. I asked the applicant in the hearing today to elaborate on this ground. He was not able to assist the Court to identify any error of law.
43. In his affidavit the applicant reiterated his claim that he was in a genuine and continuing relationship and took issue with whether or not the sponsor was independent or being victimised. However such concerns do not establish that the Migration Review Tribunal made a jurisdictional error in the manner in which it determined whether the applicant met the criteria for the class of visa for which he applied.
44. More generally in relation to the claim of a lack of procedural fairness it was contended that the applicant's compelling circumstances should be taken into account by the Court and the case remitted to the Tribunal for reconsideration. The Court does not have a discretion or power to take into account humanitarian considerations or what the applicant describes as his compelling circumstances in circumstances where no jurisdictional error has been established.
45. As no jurisdictional error has been established, the Court has no alternative but to dismiss the application.
46. The applicant has been unsuccessful and there is nothing in the circumstances of this case to warrant a departure from the normal rule that the unsuccessful applicant should meet the costs of the respondent.

The applicant told the Court that he did not have the sum sought, (\$4,300) at this time. He sought that the amount of costs be reduced to something in the order of \$2,000 so that he could pay it. However, the applicant's lack of funds and inability to pay the amount sought at this time is not a reason for not awarding costs of the appropriate amount, although it may be a matter to be taken into account by the first respondent in determining when and how to seek to recover such costs.

47. The amount that is sought is appropriate in light of the nature of this and other similar matters and bearing in mind the provisions of the Federal Magistrates Court Rules.

I certify that the preceding forty-five (45) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 4 March 2008